



# An Audit of Trust Accounts

UNDER THE

## Public Trustee Act, 1906.

BY

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# AN AUDIT OF TRUST ACCOUNTS

UNDER THE

## PUBLIC TRUSTEE ACT, 1906.

### § 1.—The Public Trustee Act, 1906.

The Public Trustee Act, 1906, constituted the office of Public Trustee, and it may be said that since the Act came into operation it has been well justified by results, as shown by the large number of Estates which are being actually administered by the Public Trustee at the present time.

It is not within the province of this paper to consider the Act from this point of view, but rather to make a few remarks relative to an Investigation or Audit of Trust Accounts carried out under the provisions of § 13 of the Act.

Under that section power is given to any Trustee or Beneficiary to call for the Audit of the Accounts of any Trust in which he may be interested, subject to certain conditions.

Prior to the passing of the Act, it was not possible to obtain such an Audit, unless with the consent of the Trustees themselves, or by application to the Court. In the latter case the Account is taken by one of the Masters of the Chancery Division, or by a Registrar of a County Court, in the presence of the

parties to the action. Vouchers must be produced for all amounts over two pounds by the accounting party, and each point in dispute is decided by the Master or Registrar after hearing the parties. Either party may appeal from such decision to the Judge, who then re-hears the case and gives his decision, which is subject to appeal to the Higher Courts. After all points in dispute have been finally settled, the result is certified by the Master or Registrar, surcharge being made on the accounting party when necessary, which can be thereupon enforced.

Under the Public Trustee Act, 1906, an Audit can be obtained without taking an action for an account, which is an expensive proceeding, and subject to interminable delays ; but an application to the Court will be ultimately necessary if the Auditor reports irregularities which have involved the accounting party in liability which he will not admit.

It is to be regretted that the Act did not go further, and make an annual Audit of all Trust Accounts compulsory, since accounts of this character are frequently of a complex nature, and involve an intimate knowledge of Trust Law. Many Executors and Trustees are private persons, who may or may not possess business capacity, but in any case have little or no knowledge of Law or Accounts. For the Law they are entitled to rely on their legal advisers, but the Accounts are more often than not left to look after themselves, with results frequently unsatisfactory to both Trustees and Beneficiaries, and sometimes disastrous to the latter.

The two classes of Beneficiaries, tenants for life and remaindermen, to whom the accuracy of Trust Accounts is of the utmost importance, are often widows and minors, who cannot criticise the Accounts in any effective manner, even where Accounts are presented. In many cases, however, Trustees present no Accounts until forced to do so, and even then such Accounts are, as often as not, incorrect. In other cases no proper Accounts are kept, and this omission has often served to conceal misappropriation of Trust moneys.

The following is the text of § 13 of the Public Trustee Act, 1906:—

13 (1) Subject to rules under this Act, and unless the Court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given in the prescribed manner by any trustee or beneficiary, be investigated and audited by such solicitor or public accountant as may be agreed on by the applicant and trustees, or, in default of agreement, by the Public Trustee or some person appointed by him:

Provided that (except with the leave of the Court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit, and that a trustee or beneficiary shall not be appointed under this section to make an investigation or audit

(2) The person making the investigation or audit (hereinafter called the auditor) shall have a right of access to the books, accounts, and vouchers of the trustees, and to any securities and documents of title held by them on account of the trust, and may require from them such information and explanation as may be necessary for the performance of his duties, and upon the completion of the investigation and audit shall forward to the applicant and to every trustee a copy of the accounts, together with a report thereon, and a certificate signed by him to the effect that the accounts exhibit a true view of the state of the affairs of the trust, and that he has had the securities of the trust fund investments produced to and verified by him, or (as the case may be) that such accounts are deficient in such respects as may be specified in such certificate.

(3) Every beneficiary under the trust shall, subject to rules under this Act, be entitled at all reasonable times to inspect and take copies

of the accounts, report, and certificate, and, at his own expense, to be furnished with copies thereof or extracts therefrom

(4) The auditor may be removed by order of the Court, and, if any auditor is removed, or resigns, or dies, or becomes bankrupt or incapable of acting before the investigation and audit is completed, a new auditor may be appointed in his place in like manner as the original auditor

(5) The remuneration of the auditor and the other expenses of the investigation and audit shall be such as may be prescribed by rules under this Act, and shall, unless the Public Trustee otherwise directs, be borne by the Estate, and in the event of the Public Trustee so directing, he may order that such expenses be borne by the applicant or by the trustees personally, or partly by them and partly by the applicant

(6) If any person having the custody of any documents to which the auditor has a right of access under this section fails or refuses to allow him to have access thereto, or in anywise obstructs the investigation or audit, the auditor may apply to the Court, and thereupon the Court shall make such order as it thinks just

(7) Subject to rules of Court, applications under or for the purposes of this section to the High Court shall be made to a judge of the Chancery Division in Chambers

(8) If any person in any statement of accounts, report, or certificate required for the purposes of this section wilfully makes a statement false in any material particular, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, and on summary conviction to imprisonment for a term not exceeding six months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment

The following provisions of the Public Trustee Rules, 1907, apply to the Investigation and Audit of Trust Accounts under the above section.

37. Any application under § 13 (1) of the Act shall be made to the Public Trustee, and notice thereof shall be given (a) if the applicant is a beneficiary, to every trustee; and (b) if the applicant is a trustee, to each co-trustee, and also to the person entitled to the receipt of the income of the trust property

38. If within three months from the date of the receipt of the notice no solicitor or public accountant shall have been appointed by the applicant and the trustees to conduct the investigation and audit, there shall be deemed to be a default of agreement within the meaning of § 13 (1) of the Act, and the applicant may apply to the Public Trustee accordingly.

39 The remuneration of the auditor and the other expenses of the investigation and audit shall be such as may be agreed on by the trustees and the person entitled to the receipt of the income of the trust property and the auditor, or (in default of such agreement) determined by the Public Trustee, who shall, in determining the same, have regard to the estimated value of the trust property, the time occupied or likely to be occupied by the investigation and audit, and the other circumstances of the case

The Auditor has a right of access to all books and other necessary documents, and the Trustee cannot make terms before producing them. Application may be made to the Court to limit the extent of the Audit, as for instance where a Reversioner makes application for the Audit the accounting Trustee might ask that the Audit should be confined to Capital; but it does not follow that the Court will make such an order. (*In re James Williams, Decd. Acct. L.R., 23 July, 1910.*)

If in the course of his Investigation any person having the custody of any documents to which the Auditor has the right of access fails or refuses to allow him to have access thereto, or in anywise obstructs the Investigation or Audit, the Auditor may apply to the Court and thereupon the Court shall make such Order as it thinks just.

Any application by the Auditor under this section is made to the Chancery Division by an originating summons, and any order then made will be enforced by a subsequent application for leave to issue writ of attachment, or for an order of committal for contempt of Court

## § 2.—The Application for an Audit.

**(a) Proposed Form of Application.**

The following is a suggested form of an application for an Audit which must be made to the Public Trustee under Rule 37 of the Public Trustee Rules, 1907:—

IN THE MATTER OF The Trust created by the

AND

IN THE MATTER OF the Public Trustee Act,  
1906, and the Public Trustee Rules, 1907.

I, of

(being one of the Trustees of the property subject to the above-mentioned Trust, or a Beneficiary under the above-mentioned Trust, entitled to ) hereby apply that the condition and accounts of the above-mentioned Trust may be investigated and audited by such Solicitor or Public Accountant as may be agreed on by me and the Trustees of the above-mentioned Trust, within three months from the date of the receipt of this notice, or, in default of such agreement, by you, or some person appointed by you, in accordance with the provisions of § 13 of the above-mentioned Act and the Rules made thereunder.

I hereby declare that such an Investigation or Audit has not been required and made within twelve months from the date hereof.

The present Trustees of the above-mentioned Trust are and notice of this application has been served on them this day of 19 .

To the Public Trustee.

**(b) Proposed Form of Notice of Application.**

The following is a suggested form of Notice of application for an Audit which must be sent to every Trustee, if the applicant is a Beneficiary, and, if the applicant is a Trustee, to each co-Trustee, and also to the person entitled to the receipt of the income from the trust property.

IN THE MATTER OF The Trust created by the

AND

IN THE MATTER OF the Public Trustee Act, 1906, and the Public Trustee Rules, 1907.

Notice is hereby given that I, of (being one of the Trustees of the property subject to the above-mentioned Trust, or a Beneficiary under the above-mentioned Trust entitled to ) have this day made application to the Public Trustee that the condition and Accounts of the above-mentioned Trust may be investigated and audited by such Solicitor or Public Accountant as

may be agreed on by me and the Trustees of the above-mentioned Trust, within three months from the date of the receipt of this notice, or in default of such agreement by the Public Trustee, or some person appointed by him, in accordance with the provisions of § 13 of the above-mentioned Act and the Rules made thereunder.

And I hereby request you to agree to the appointment of \_\_\_\_\_ of \_\_\_\_\_ Public Accountant, to investigate and audit the condition and Accounts of the said Trust.

Dated this \_\_\_\_\_ day of

19

T<sub>0</sub>

**(c) Form of Appointment of Auditor by Public Trustee.**

In the event of default of agreement within three months, the Public Trustee exercises his power of appointment, and the following is the official form of appointment which is sent to the Auditor under the seal of the Public Trustee:—

IN THE MATTER OF The Trust created by the

## AND

IN THE MATTER OF the Public Trustee Act, 1906,  
and the Public Trustee Rules. 1907.

WHEREAS in pursuance of the above-mentioned Act and Rules, application has been duly made to the

Public Trustee for the Investigation and Audit of the condition and Accounts of the above-mentioned Trust, and notice of the said application has been duly given AND WHEREAS the applicant and the Trustees under the said Trust have failed to agree on a Solicitor or Public Accountant to conduct such Investigation and Audit AND WHEREAS no such Investigation and Audit has been made within the twelve calendar months now last past Now THEREFORE the Public Trustee hereby appoints

of

to Investigate and Audit the condition and Accounts of the said Trust as soon as may be after the date of these presents.

T<sub>0</sub>

### § 3.—Books and Documents required.

As soon as the Auditor receives the notice of appointment he should communicate with each Trustee, informing them that he has been appointed, and indicating that his powers under the Act give him a right of access to the books, accounts and vouchers, and to any securities and documents of title held by them on account of the Trust ; also that he is entitled to require from them such information and explanations as may be necessary for the performance of his duties.

It may be convenient for the Auditor to afford the Trustees a list of the various Accounts and Documents which he will require. In ordinary cases these will be as follows:—

- (1) A copy of the Will of the Deceased, and Codicils, if any.
- (2) Copies of any Ante- or Post-Nuptial Settlement.
- (3) Drafts of Estate Duty Affidavits, and Corrective Affidavits, if any, and the Residuary Account.
- (4) A Schedule of assets of which the Deceased died possessed.
- (5) A Schedule of debts due at death.
- (6) A Schedule of the Securities representing the Trust Fund investments as at present existing.
- (7) The Books in which the Trust Accounts are recorded, if any.
- (8) If no Books exist, a Cash Account showing the transactions on account of Capital, and a similar Cash Account showing the transactions on account of Income.
- (9) The Bank Pass Books.
- (10) The Paying-in Books.
- (11) Counterfoil Cheque Books and returned cheques.
- (12) All Vouchers for payments arranged in order of date of payment.
- (13) Stockbrokers' Bought and Sold Notes.
- (14) Accounts of Auctioneers or others for the sale of property.

- (15) Counterfoils of dividend warrants.
- (16) Copies of any Balance Sheets or Statements of Account that may have been prepared.
- (17) Testator's Books of Account, if any.

If the Auditor is a Professional Accountant, and finds that the Accounts have been properly kept in separate Books upon a double entry basis, making it possible for a Trial Balance to be obtained and a Balance Sheet prepared, his work will be so much facilitated that it is not proposed to consider a case of this sort here; particularly as an Investigation and Audit under the Act is much more likely to be called for when Accounts have not been properly kept.

It will be assumed therefore that the only Accounts submitted are Cash Accounts in respect of Income and Capital, and Schedules of the Assets of which the Testator died possessed, the debts due at death, and the securities at present representing the Trust Fund. It will further be assumed that the Auditor is also supplied with the various vouchers and documents set out above.

#### § 4.—Verification of Securities.

As soon as the Auditor has been able to make a general examination of the books and papers, he should call upon the Trustees to produce for his inspection the securities representing the Trust Fund, which he should check off with the Schedules submitted to him.

The Securities should all be produced at the same time, except in cases where they are lodged at a Bank

for safe custody, when the Auditor should attend personally at the Bank, and examine the Securities, taking care to ascertain that they are not lodged as cover for an advance, and that the lodgment has been effected in the joint names of the Trustees.

The existence of the Securities for which the Trustee should account having been verified as indicated below, the Auditor can leave for the time being the question as to whether the Schedule of Securities submitted by the Trustees includes the whole of the Securities for which they ought to account, until he has been able to complete his examination of the Accounts.

**(a) Bearer Securities.**

In examining Bearer Securities, it should be seen that coupons for the next and subsequent payments of interest are attached. Under § 7 of the Trustee Act, 1893, a Trustee, unless authorised by the terms of his Trust, must not apply for, or hold, any certificate to bearer issued in respect of Consols, India Stocks, Local Loans, and Colonial Stocks.

**(b) Registered Stocks and Shares.**

The certificates should be examined, and it should be seen that certificates for Registered Stocks are made out in the names of all the Trustees, note being taken of any cases where the certificates are made out in the name of one only of the Trustees. Sometimes it will be found that one or more of the certificates

produced are in the name of the deceased, no new certificate having been issued to the Trustees. This may have been owing to the non-production of probate, or to the fact that the regulations of the Company do not require a new certificate to be issued. The Auditor should take a note of any such cases.

(c) **Inscribed Stocks.**

No certificate is issued to the holder of Inscribed Stocks, but his name is inscribed in the Register of Stock kept at the place of inscription, which will usually be either the Bank of England, the London County and Westminster Bank, Lothbury, or the offices of the Crown Agents for the Colonies. A large number of Trustee Stocks are inscribed in this manner.

At the time of purchase of Inscribed Stocks, a Stock receipt is issued, setting forth the nominal amount purchased, and the consideration; but this receipt does not require to be delivered on the sale of the Stock, and consequently possesses no value as a document of title, although it affords good evidence of the amount of stock purchased, and the cost thereof.

In order to verify the existence of the stock, a form of certificate should be obtained from the Bank of England, or other place of inscription, which should be filled up with particulars of the stock, and the names of the persons to whom it is inscribed, and sent to the Bank for verification. If in order, the certificate will be returned duly signed on behalf of the Bank, and will certify that such stock was held on the day in question. Instructions should be given

for the certificate to be sent direct to the Auditor, in order to prevent any possibility of alteration of the figures.

Note should be taken of any stock inscribed in the name of one Trustee only.

**(d) Freehold and Leasehold Property.**

The Title Deeds and Leases should be examined, and it should be seen that they have been duly conveyed where necessary. If the property is subject to a Mortgage, the title deeds will be in the possession of the Mortgagee, or the Solicitor, and a certificate should be obtained to that effect.

In the case of Freehold Ground Rents, title deeds and counterparts of leases should be examined by the Auditor, and it should be seen that the last ground rent has been duly received.

Under § 18 of the Trustee Act, 1893, the Trustee may insure against loss or damage by fire any buildings or other insurable property, to any amount not exceeding three-fourths of the full value of such building or property, and pay premiums out of income. The Auditor should ascertain that all insurable property has been duly insured.

**(e) Mortgages.**

In verifying Loans on Mortgage, the Mortgage Deed conveying the property should be examined, together with the title deeds.

The last receipt for insurance should be produced, in order that it may be seen that the property is

protected against fire, and in the case of Leaseholds the last receipt for ground rent.

Under § 8 of the Trustee Act, 1893, a Trustee lending money on the security of any property on which he can lawfully lend, shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time the loan was made, provided it appears to the Court that in making the loan the Trustee was acting on a report as to the value of the property made by a competent Surveyor or Valuer, instructed and employed independently of any owner of the property, and that the amount of the loan does not exceed two-thirds of the value of the property as stated in the report, and that the loan was made under the advice of the Surveyor or Valuer, as expressed in the report. The Auditor should see the Valuer's Report, and ascertain that these conditions have been complied with.

### § 5.—Examination of the Will.

The Auditor should examine the Will, and make notes of all matters affecting the Estate, which will usually comprise the following:—

- (1) Names of Executors and Trustees.
- (2) Reference made by the Deceased to any specific assets or property.
- (3) Specific legacies bequeathed.
- (4) General legacies bequeathed.
- (5) Annuities bequeathed.

- (6) Directions as to whether legacies and annuities are to be free of duty or otherwise.
- (7) Directions as to disposal of residue. If bequeathed in Trust, particulars of any separate or contingent Trust, with the names of the tenants for life, and the proportions in which they are entitled to the income from the Trust property.
- (8) Powers conferred on the Trustees as to the retention or conversion of unauthorised securities and assets of a wasting nature.
- (9) Powers conferred on the Trustees as to the investment of Trust funds.
- (10) Any special clauses or directions affecting the Accounts.

### § 6.—Vouching the Capital Account.

The Cash Account, recording receipts and payments on account of Capital, should be vouched by the Auditor. The first item will usually be Cash at Bank, on Current Account or Deposit, and in hand, at the date of death, and these items can be vouched from the Estate Duty Affidavits, the production of the Testator's Pass Book, or if necessary a certificate from the Bankers. Sales of Investments will be vouched by the Brokers' Sold Notes, and sales of furniture and effects, or freehold and leasehold property, &c., by production of the Auctioneers' Accounts, and marked catalogues, contracts, particulars of sale, &c.

Refunds of Capital, in the event of the Liquidation of Companies in which the deceased held shares, should be vouched with the letters from the Liquidators, enclosing the remittances, and any other receipts of a special nature should be vouched by correspondence, or whatever evidence may be available.

As regards Capital payments, the Estate Duty will be vouched by the drafts of the Estate Duty Affidavit and Corrective Affidavit, supported by the returned cheques. For debts due at death, vouchers from tradespeople and others should be examined, and it should be seen that none of the items included relate to a period subsequent to the date of death. This particularly applies in the case of payments for rent, gas, water, &c., which may require to be apportioned. Other Testamentary expenses, such as Law costs, &c., will be vouched by the production of the accounts and receipts, care being taken to see whether the whole of the payments are properly chargeable to Capital.

Legacies should be vouched by the production of the official receipts, signed by the Legatees; and the payment of legacy duties, and duties on the residue by the production of the official receipts and the draft of the Residuary Account.

Purchase of investments will be vouched by the production of Brokers' Bought Notes.

Any sums paid away to Beneficiaries on account of Capital representing their share of the Estate, should be vouched by the receipts duly signed, and Accounts should be submitted showing how the share so paid away has been arrived at.

Similarly any advances made to Beneficiaries in anticipation of their shares should be vouched, and it should be seen that they have been made in accordance with power contained in the Trust instrument, and that they have been charged against the proper fund.

### § 7.—The Securities Account.

Where the transactions in securities have been considerable, and the Accounts extend over a period of years, it is difficult to ascertain, from an examination of the Cash Account alone, whether the whole of the securities that should be in hand are set out in the Schedule of Securities existing at the date of the Investigation, and the best method of proving whether this is so, is to construct what may be termed a Securities Account to record all dealings in Securities on the basis of their nominal value.

On the debit side of this Account should be set out at their nominal value the Securities comprised in the Schedule recording the assets at the date of death, which should first have been verified by comparison with the drafts of the Affidavits for Estate Duty and Corrective Affidavits, if the Deceased died after the 1st August, 1894. Where the Deceased died prior to that date, it will not be possible to obtain these Affidavits setting out the details of the Estate, as before the passing of the Finance Act, 1894, it was

the practice merely to swear the total value of the Estate as being under a certain figure. In such a case the Auditor must rely on whatever other evidence may be available in the shape of contemporary documents or otherwise, but it is possible that he may not be able to prove to his own satisfaction the assets of which the Estate originally consisted, and if so he must deal fully with these points in his report.

Space should be left under each security, and additional investments acquired on conversion of other funds should be entered on the debit side of the Account, under the heading to which they relate, or a fresh heading opened, as the case may be, reference being made to the date of purchase, and the cost as shown by the Cash Account.

On the credit side of the Securities Account should be set out any sales or conversion of investments, particulars being inserted against the item to which they relate, and reference made to the Cash Account recording the receipt of the proceeds, the items being extended at their nominal value.

A balance column should be provided to record the final balance of each stock on hand at the close of the period of audit, and the Auditor should check such balances with the Schedule of Securities he has already verified, and call upon the Trustees to produce any securities not included therein, and explain the reason of their omission.

The following is a specimen Securities Account of this nature :—

SECURITIES ACCOUNT.

URITIES AS AT DATE OF DEATH, AND SINCE PURCHASED	SECURITIES SOLD.					
PARTICULARS	Nominal Value	Date	C B Ref	Amount Realised	Nominal Value	Nominal Balance at
	£ s d			£ s d	£ s d	£ s d
West Shropshire Railway 3½% Debenture Stock— 4250 as per Listate Duty Account	2,50 0 0	1 March		2,50 0 0	2,50 0 0	—
Smithfield Meat Trust £1 Ordinary Shares fully paid 1,000 Shares as per Estate Duty Account	1,000 0 0	28 Jan		962 1 4	1,000 0 0	—
India 3% Stock— £700 as per Estate Duty Account	700 0 0			—	—	700 0 0
£700 purchased at 80, £560 18s 6d	700 0 0			—	—	700 0 0
North American Steam Ship Company £1 Ordinary Shares fully paid— 800 Shares as per Estate Duty Account	800 0 0	30 Nov		909	362 0 0	400 0 0
London Coal Trust, Ltd £1 Ordinary Shares fully paid— 1,000 Shares as per Estate Duty Account	1,000 0 0	—		—	—	1,000 0 0
Lynton Corporation 4% block— £812 10s 0d purchased at par, £813 11s 4d	812 10 0	—		—	—	£12 10 0
	£2,262 10 0			£1,178 1 4	1,600 0 0	£612 10 0

### § 8.—The Investment Clause.

The Auditor should see that the Investment clause of the Will has been carried out, and that none of the investments made by the Trustees are of a nature unauthorised by the Will. If no special powers are given by the Will, the Auditor should see that all investments made by the Trustees are in accordance with the provisions of the Trustee Act, 1893, and the Colonial Stock Act, 1900. This applies not only to the securities in hand, but also to any securities that may have been purchased and subsequently sold by the Trustees prior to the date of the Investigation. Where improper investments have been made, and loss has been occasioned to the Estate, the Trustees are liable to account therefor, but the Auditor has no power to surcharge, and can only deal with the matter in his report.

Where the interest in the residue of Personality has been bequeathed to one or more persons for life, with remainder over, and the whole or part of the residue consists of assets of a wasting and hazardous nature, under the ruling in *Howe v. The Earl of Dartmouth* (1802, 7 Ves. 137), it is the duty of the Trustees, subject to the directions of the Will, to convert the wasting and hazardous property into money, and invest the proceeds in authorised securities.

The conversion should be made within one year of death, and where this is done the tenant for life is entitled to 3 per cent. on the actual net proceeds of such conversion, from the date of death to realisation.

(*Gibson v. Bott*, 7 Ves. 89 ; *Macpherson v. Macpherson*, 1 Macq. 243 ; *Re Nicholson*, 1895, W.N. 106 ; *Re Woods*, 2 Ch. 4.)

If the property is of such a nature that it cannot be converted within one year of death without heavy loss being incurred, the tenant for life is entitled to 3 per cent. on the Capital value of the property as at the date of the Testator's death. (*Gibson v. Bott*, *supra* ; *Meyer v. Simonson*, 5 De G. and S. 723 ; *Re Nicholson*, *supra* ; *Re Woods*, *supra*.)

If the property could have been converted during the year without difficulty, but has been retained at the discretion of the Trustees, the tenant for life is entitled to the proceeds of such an investment in Consols as could have been acquired with money representing the value put upon the property at the expiration of one year from death. The balance of income derived from the property is capitalised in each case, and goes to increase the corpus of the Estate, and in a corresponding degree the future income also. (*Dimes v. Scott*, 1828, 4 Russ. 195 ; *Brown v. Gellatley*, 1867, 2 Ch. 751 ; *Re Duckworth*, 35 S.J. 561.)

Where the Testator's Will clearly indicates that the rule is not to apply, the tenant for life is entitled to all the income (*Pickering v. Pickering*, 1839, 4 My. and Cr. 289) ; and the same is the case where there is no Trust to convert, and power is given to retain existing investments. (*Re Bates*, 1907, 1 Ch. 26.)

The rule does not apply in the case of Real Estate, even where there is a Trust for sale with a power to postpone, which has been exercised, or where the sale

without any impropriety has been postponed ; and the rents and profits of the Real Estate in such a case, until sale, are payable to the tenant for life. (*Re Searle*, 1900, 2 Ch. 829 ; *Re Lord Darnley*, 1906, 33 L.T. 93.)

In cases where these rules apply but they have not been carried out by the Trustees, the Auditor must deal in his report with the resultant effect as regards the tenant for life and the remainderman, since if it is found that the Tenant for life has received more Income than he would have been entitled to, the Trustees may be liable to make good the balance, if the same cannot be recovered from the tenant for life.

In cases where other equitable rules of apportionment apply, the Auditor should ascertain whether they have been given effect to. A common instance is that afforded by the realisation of a Mortgage security at a loss, when both principal and interest must abate proportionately. The rule laid down in *Re Atkinson* (1894, 2 Ch. 160) is as follows :—The principal and all arrears of interest to the date of realisation must be aggregated, and the amount realised divided in the ratio that the principal and arrears of interest bear to the aggregation respectively.

Where the property is let and has been taken possession of, the tenant for life receiving the rents, the apportionment should be made on the basis of the net amount due to income after taking into account moneys already received by the tenant for life.

### § 9.—Carrying on a Business.

An Executor or Trustee is not entitled to carry on a trade or business previously carried on by the deceased, further than may be necessary to enable him to beneficially wind up the business, and, if necessary, to sell as a going concern.

If the business be carried on, all profits will belong to the Estate ; while in the event of loss, the Executor or Trustee is personally liable for all debts incurred since the Testator's death, if there is a deficiency of assets.

No further Capital can be employed in the business than was employed at the date of death ; but if the Will by distinct and positive authority authorises the carrying on of the business, further Capital may be utilised to the extent to which the Will specifies.

The Executor or Trustee will then, although still personally liable for debts incurred, be entitled to be indemnified out of the assets.

Separate Accounts should be kept of the business (if any), which should be audited by the Auditor in the same manner as an ordinary Trading Audit is conducted.

### § 10.—Vouching the Income Account.

The Income from investments should be vouched by reference to the counterfoils of dividend and interest warrants, where these are available. In the case of

many inscribed stocks, no counterfoils are sent to the Stockholders, but the dividend can be checked as the rates of interest will be known, and this applies to other cases, such as interest on Mortgages, Debentures, &c. Where no evidence of this nature is available, and the rates of dividend are not fixed, letters should be obtained from the secretaries of the bodies concerned, stating the rates of dividend paid during the period covered by the Investigation. In some cases information can be obtained from the published reports of Companies.

In order to ascertain that the whole of the Income from investments that ought to have been received has been received, the Income from each investment appearing in the Securities Account should be vouched in the above manner, from the date of death, or the date of the commencement of the Investigation, attention being paid to any changes in each investment, and the date thereof. If stocks have been bought *cum div.*, or sold *ex div.*, it should be seen that the dividend has ultimately been received. In this connection it may be remarked that under the rule in *Re Clarke* (1881, 18 C.D. 160), purchases and sales of stock *cum div.*, are not apportionable, although if this rule has been taken advantage of by the Trustees, for the purpose of unduly benefiting either the tenant for life or the remainderman, as the case may be, the Auditor should report the facts, as the Court on application would restrain the Trustees from any such improper changing of investments for the benefit of one of the parties.

Particulars of all Income in arrear should be noted, enquiries being made as to why it has not been received.

Where income is derived from rents, the Auditor should inspect the counterparts of the Tenants' leases or agreements, in order to ascertain the rents payable, provisions as to repairs, &c., and the receipt of all rents should be vouched. It should be seen that any deductions made by the tenants, otherwise than for Income Tax, viz., in respect of repairs or special allowances, have been duly authorised by the Trustees, and enquiries should be made into all arrears outstanding.

The treatment of repairs to property should be examined by the Auditor. Unless instructions are given in the Will, there would appear to be no obligation on the part of the life tenant to pay for repairs, although as the properties obviously cannot be kept occupied without such expenditure, the income will necessarily suffer accordingly. It is therefore usual to find all current repairs paid out of income, but where structural alterations or additions have been made, the cost is usually borne by Capital, if power is afforded to the Trustees to utilise the Trust funds in this manner.

It should be seen that all amounts paid out of Income are properly so payable, and that the balance of the income has been paid to the respective tenants for life in the proportions to which they may be entitled thereto. Where payments are made to tenants for life on account, although vouchers should be forth-

coming in respect of each item, these may not have been obtained by the Trustees, in which case it may be sufficient for the Auditor to accept endorsed cheques.

In the case of any annuities having been paid out of Income, it should be seen that they have been paid less tax.

It should be ascertained that the provisions of the Apportionment Act, 1870, have been complied with, and that all interests, dividends, rents, and other items of a similar nature, have been apportioned as at the date of death of the Testator, or of a tenant for life. Similar considerations apply to outgoings in the shape of rents and interest payable.

A schedule should be obtained of these apportionments, and the Auditor should check the calculations.

Where the Accounts do not clearly show the income derived from each investment each year, in a manner enabling the same to be easily verified, it may be convenient for the Auditor to prepare in columnar form a statement which will readily afford this information. This may be done by providing a column for each investment held, and inserting thereunder the dividends received each year. In this manner the dividends received can be ascertained at a glance, and it can be seen whether all interest and dividends that ought to have been received have been received, having regard to any subsequent sale or purchase of investments, as shown by the Securities Account.

The following is a specimen Statement of this nature:—

ANALYSIS OF INCOME

YEAR	India 3 %	North American Steam Ship Co., Ltd	London Coal Trust, Ltd	Lynton Corporation 4 %	REMARKS
1907	£ s d	£ s d	£ s d	£ s d	
	19 19 0	20 0 0	20 0 0	15 8 10	Income Tax 1s
	19 19 0	16 0 0		15 8 10	
	19 19 0				
	19 19 0				
	£79 16 0	£36 0 0	£20 0 0	£30 17 8	
1908	19 19 0	32 0 0	—	15 8 10	Income Tax 1s
	19 19 0	32 0 0	—	15 8 10	London Coal Trust
	19 19 0	—	—	—	Dividend passed.
	19 19 0	—	—	—	
	£79 16 0	£64 0 0	—	£30 17 8	
1909	19 19 0	32 0 0	15 0 0	15 8 10	Income Tax 1s and 1s 2d
	19 19 0	32 0 0	—	15 6 2	
	19 15 6	—	—	—	
	19 15 6	—	—	—	
	£79 9 0	£64 0 0	£15 0 0	£30 15 ..	
1910	39 11 0	18 0 0	25 0 0	15 6 2	Income Tax 1s 2d
	39 11 0	16 0 0	—	15 6 2	
	39 11 0	—	—	—	
	39 11 0	—	—	—	
	£158 4 0	£32 0 0	£25 0 0	£30 12 4	

§ 11.—The Banking Account.

Where the whole of the receipts have been paid into the Bank, and all payments made by cheque, a separate Account having been opened for the Estate, the Auditor will be able to check the Pass Books with the Capital and Income Accounts, the balance of the two Accounts taken together being agreed with the balance on the Pass Book, subject to outstanding cheques. The Auditor should obtain a certificate from the Bank of the balance on Current or Deposit Account.

Where, however, no separate Banking Account has been opened for the Trust, but the receipts and payments have been dealt with through the private Accounts of one or other of the Trustees, the Auditor should take special care to ascertain that moneys have not remained in the hands of one or other of the Trustees for a period longer than the circumstances require, since, if this were done, the Trustee concerned would have been able to utilise the moneys temporarily for his own advantage. In any case where no separate Banking Account has been opened by the Trust, the Auditor should report on the subject, and advise that a separate Banking Account be opened.

A Trustee, failing to invest, may be charged with interest at 3 per cent. on the amount uninvested. If he employ Trust funds for the purpose of his own business, the Beneficiaries have the option of claiming all the profits, without being responsible for losses, or 5 per cent. compound interest during the time the money is so employed.

## 12.—The Auditor's Certificate and Report.

When the Investigation is completed, the Auditor is required to send a copy of the Accounts, duly certified, accompanied by his Report, to each Trustee and to the Beneficiary appointing him. If appointed by the Public Trustee, he should send a copy of his Report and the Accounts to the Public Trustee also.

The following is the form of Certificate required under Section 13 of the Act :—

“ I hereby certify that the above Accounts exhibit a true view of the state of the affairs of the Trust, and that I have had the Securities and the Trust Fund Investments produced to me, and that I have verified the same ”

Where the Accounts are deficient in any respect, or the Auditor has not been able to examine all the Securities, he must qualify his Certificate accordingly.

From the wording of the section it is the duty of the Auditor to forward a copy of the Accounts, but this cannot mean a copy of the detailed Accounts, and presumably refers to such summary of the Accounts, as may be most convenient, having regard to the nature of the Estate and the period covered by the Investigation.

The Report should be drawn up as shortly, clearly and concisely as possible, and it is not desirable that the Auditor should enter into too much detail. A broad and impartial view should be taken of the way in which the Trustees have carried out the Trust, even though the Accounts may not have been kept in a theoretically correct manner.

Where there are a number of minor points that cannot be cleared up without the expenditure of considerable time, the Auditor should report this fact generally, and express his opinion as to whether their investigation would be of sufficient advantage to the Trust to warrant the cost involved; but he should in the first place satisfy himself that these discrepancies do not conceal any serious omissions or errors.

If the Investigation discloses irregularities for which the Trustees can be made liable, but the Trustees are not prepared to admit such liability, or to make good any damage sustained by the Estate, the only remedy for the Beneficiary is to apply to the Court. It should be remembered that the Auditor appointed under this Act has no powers to surcharge, or do otherwise than report, and that the Public Trustee has no power to surcharge the Trustees.

The only power residing in the Public Trustee, after the conclusion of the Audit, is the determination of the remuneration of the Auditor, and the other expenses of the Investigation and Audit, in default of agreement between (1) all the Trustees ; (2) the person or persons for the time being entitled to receive all the income from the Trust property ; and (3) the Auditor. Unless the Public Trustee otherwise directs, such remuneration and expenses shall be borne the Estate ; but he may order that such expenses shall be borne by the applicant, or by the Trustees personally, or partly by them and partly by the applicant.